

FAMILY MEDICAL AND MILITARY LEAVE POLICY

508 Family and Medical Leave Policy

Statement of Compliance – The Town of Big Flats complies with the provisions of the Family and Medical Leave Act (FMLA).

Policy Statement – It is the policy of the Town of Big Flats to grant an employee, who has been employed by the Town for at least 12 months, and has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, a leave of absence without pay for a period of up to twelve weeks, if and when any employee meets the eligibility requirements under the Family and Medical Leave Act. **Please note that under the NY Paid Family Leave Act effective 1/1/18 an employee who has worked twenty-six or more consecutive weeks is eligible for these benefits.** The provisions of that Act will then take precedence over this policy. For a complete statement of the requirements etc. of that Act may be found at 29 CFR Part 825 or at <https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol3/xml/CFR-2011-title29-vol3-part825.xml>. CFR stand for Code of Federal Regulations. **What follows does not incorporate every wrinkle in regard to these benefits.**

Please note that the NY Paid Family Leave act does not start until 2018 and then will be phased in over a four-year period. That law gives employees the option to first start a leave using accruals or start with the Family Leave provisions. Note that under the Family Leave act and until the NY law takes real effect, leave under that FMLA is not paid leave but coverage under health insurance continues.

Granting of Leave of Absence – The granting and duration of each leave of absence will be determined by the Town Supervisor or a person delegated by him/her to handle the issues or by the employee's department head in consultation with the Town Supervisor or his/her delegated official and will be decided in conjunction with applicable federal and state laws, including Civil Service Law Sections 71, 72 and 73, as applicable, and the Rules for the Classified Civil Service of Chemung County.

Commencement of the Family Medical Leave - an employee may first use all sick leave and vacation leave credits or take the benefits for pay under the NY Paid Family Leave Law immediately or take the NY Paid Family Leave time after accruals are exhausted. The employee should be notified of commencement of FMLA immediately. Under certain circumstances this leave may be taken on an intermittent basis or by a reduced work schedule.

Types of Leave – The following types of leaves of absence will be considered:

- **Sick Leave of Absence** – Employees who are unable to work because of a serious health condition or disability may be granted a sick leave of absence. This type of leave includes disabilities caused by pregnancy, childbirth, or other related medical conditions. **The Town requires certification of an employee's need for sick leave, both before the leave begins and on a periodic basis thereafter, by the employee's health care provider.** Under the NY Paid Family Leave act one is not eligible for paid leave

for their **own** disability or health issue but may have coverage under the NY Disability Law and will be eligible for protection under the Federal Family Medical Leave Act.

Note that some employees may be eligible for a leave of absence pursuant to Civil Service Law Section 71. Section 71 provides that covered employees shall be entitled to a leave of absence for **at least one cumulative year** (unless found to be permanently disabled) when disabled due to an occupational injury or disease as defined in the Workers Compensation Law. This leave runs concurrently with the any leave granted pursuant to the Family and Medical Leave. Employees should consult with their Department Head for further details regarding this provision. This means if an employee has been out of work for one year and tries to return to work, he or she may not be allowed to return and may be terminated.

- **Parental Leave of Absence** – Female employees, when not disabled by pregnancy or childbirth (see above), and male employees may be granted a parental leave of absence to care for a child upon birth or upon placement for adoption or foster care.

- **Family Care Leave of Absence** – Employees may be granted a family care leave of absence for the purpose of caring for a child, spouse or parent who has a serious health condition. **The Town requires certification of the family member's serious health condition, both before the leave begins and on a periodic basis, by the family member's health care provider.** Caring for in-laws is not covered.

- Spouses, both of whom work for the Town of Big Flats, are allowed a **combined** maximum of twelve workweeks of leave for the birth or care of a newborn child, adoption or foster care of a child and to care for such newly placed child, or the serious health condition of a child, spouse or parent, during any twelve-month period.

Definitions – For the purpose of this policy, the following definitions will apply:

- **Serious Health Condition** will mean an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility, or any subsequent treatment in connection with such inpatient care; or continuing treatment by a health care provider, including, but not limited to:

- * A period of incapacity of more than three consecutive calendar days and any subsequent treatment or period of incapacity that also involves continuing treatment by a health care provider;

- * A period of incapacity due to pregnancy or prenatal care;

- * A period of incapacity or treatment for such incapacity due to a chronic serious health condition;

- * A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective; or

- * A period of absence to receive multiple treatments, including any period of recovery, by a health care provider, or by a provider of health care services under orders of or on referral by a health care provider, for restorative surgery after an accident or other injury or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.

- **Health Care Provider** means a doctor of medicine or osteopathy who is authorized to practice medicine or surgery by the State in which the doctor practices; or any other person defined in the FMLA regulations capable of providing health care services.

• **Family Member** will mean and refer to:

* **Spouse** – husband or wife as defined or recognized under State law for purpose of marriage;

* **Parent** – biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter as defined directly below. This term does not include an employee's parents "in law".

* **Child** – biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age eighteen, or age eighteen or older and "incapable of self-care because of a mental or physical disability".

*Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

Notification Requirements – If the need for leave is foreseeable, the employee must give notice, in writing, to the Town Supervisor or his/her designee at least thirty calendar days prior to the commencement date of the unpaid leave. The employee must complete the Leave of Absence Request Form and forward the completed form to the Supervisor for review. The failure of an employee to give thirty days' notice of foreseeable leave with no reasonable excuse for the delay may result in the delay of the employee taking the leave until thirty days from the date of notice. When the need for leave is unforeseeable, verbal notice to the Town Supervisor or his/her designee will be sufficient.

Status Reports – The employee must periodically update the Town Supervisor or his/her designee as to the employee's status and intent to return to work.

Medical Certification – The employee must produce a medical certification issued by a health care provider which supports the need for a leave under this policy. When required, the employee must provide a copy before the leave begins, or if the leave was unforeseeable, no later than fifteen calendar days from the date the certification was requested. Failure to submit medical certification may jeopardize the employee's eligibility for an unpaid leave of absence and/or the ability to return to work. The medical certification must include:

- The date the medical condition began;
- The probable duration of the medical condition;
- Pertinent medical facts; and,
- An assertion that the employee is unable to perform the employee's essential job functions or that the employee is needed to care for a family member for a specified period of time.

The Town of Big Flats reserves the right to request a second opinion by another health care provider. The Town will pay for the second opinion. In the event a conflict occurs between the first and second opinion, the Town may, again at its own expense, obtain a third opinion from a health care provider approved jointly by the Town Supervisor or his/her designee and the employee. This third opinion will be final and binding.

***Leave for the Birth, Adoption or Foster Care Placement of a Child** – Leave for the birth of a child or the placement of a child for adoption or foster care to the employee must conclude within twelve months from the date of the birth or placement.

Certification for Adoption/Foster Care – An employee must produce proper certification from the appropriate agency for an unpaid leave for the adoption or foster care of a child.

Employment Restrictions During Leave of Absence - The employee may not be employed by another employer during the same hours that the employee was normally scheduled to work for the Town of Big Flats.

***Military Family Leave Entitlements**

Eligible employees with a spouse, son, daughter, or parent on active duty or called to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service-member during a single 12- month period. A covered service-member is a current member of the Armed Forces, including a member of the National Guard or Reserves who has a serious injury or illness incurred in the line of duty on active duty that may render the service-member medically unfit to perform his or her duties for which the service-member is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list. The definition of a Covered Service Member also includes veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness so long as it was incurred in the line of active duty and who was a member of the Armed Forces (including National Guard or Reserves) at any time during the five-year period preceding the date on which the veteran undergoes that medical treatment, recuperation or therapy.

Benefits During a Leave of Absence – For the purpose of this policy, the following will apply:

- **Use of Accrued Paid Leave Credits** – In New York State under the Paid Family Leave Law an employee taking leave for the birth, adoption or foster placement of a child or to care for a spouse, child or parent with a serious health condition can either first use all vacation leave credits (accruals) which will be included in the maximum twelve weeks of leave or take the benefits for pay under the NY Paid Family Leave Law (**but note that the NY Paid Family leave act is not being implemented until January 1, 2018**, so until that date the Town Supervisor reserves the right to determine what will be taken first under all circumstances. The substitution of paid leave for unpaid leave for these types of leave does not extend the twelve-week period. In other words, the taking of leave paid by accruals runs concurrently with the FMLA.

For leaves taken due to the employee's own serious health condition, the employee may first use all sick leave and vacation leave credits or take the benefits under the NY Paid Family Leave Law (**but note that the NY Paid Family leave act is not being implemented until January 1, 2018 and see reservation above**), which will be included in the maximum twelve weeks of leave. However, in the event that the paid leave credits available are greater than the maximum twelve-week period, an employee may use paid leave credits to extend the leave of absence beyond the twelve-week period, up to a maximum of one year. If, after the completion of the one-year leave of absence, the employee is medically unable to return to work (as determined by a health care provider) and the employee has leave credits remaining, the Town Board may authorize an extension of the employee's leave of absence until such benefits are exhausted. However, job reinstatement beyond the one-year leave of absence is not automatic and will be dependent upon job availability, in accordance with Civil Service Law Sections 71, 72 and 73, as applicable, and the Rules for the Classified Civil Service of Chemung County.

- **Accrual of Paid Leave Credits** – An employee will continue to accrue vacation and sick leave and receive holiday pay during the portion of the leave that is paid, but not for time on leave taken under the NY Paid Family Leave Act. Paid leave is defined as leave during which the employee continues to use accumulated paid vacation and sick leave. After all such paid leave is exhausted, the remaining leave of absence is unpaid. An employee will not earn paid vacation, personal leave or sick leave or receive holiday pay for any holidays that may occur during an unpaid leave of absence.

- **Medical Insurance** – During the period of authorized leave under this policy, up to a maximum of twelve weeks, an employee's eligibility status for medical insurance coverage will not change. All employee contributions (if any) must be paid by the employee on a timely basis in order to maintain the continuous coverage of benefits. Contributions will be at the same level as if the employee was working. Coverage will cease if payments are not made within a thirty-calendar day grace period of the due date. Premium payments or policy coverage are subject to change. In the event the employee fails to return to work after the authorized leave of absence period has expired, provisions of COBRA (see Section 711) will apply. In addition, the Town may recover the premium that it paid for maintaining the coverage during any period of the unpaid leave except for the following circumstances:

- * The continuation, recurrence, or onset of a serious health condition of the employee or the employee's eligible family member with proper medical certification; or,

- * Circumstances beyond the employee's control, such as: parent chooses to stay home with a newborn child who has a serious health condition; employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's work-site; the employee is laid off while on leave.

Return to Work – The following conditions for returning to work will apply:

- **Job Restoration** – At the conclusion of the leave of absence, (except for leaves beyond a one-year period as in Workers Compensation cases) the employee, provided that the employee returns to work immediately following such leave, will be restored to the position the employee held when the leave began, or an equivalent position with equivalent benefits, pay and working conditions. For an authorized leave of absence beyond the one-year period, job restoration will be dependent upon job availability, in accordance with Civil Service Law Sections 71, 72 and 73, as applicable, and the Rules for the Classified Civil Service of Chemung County.

- **Medical Statement** – Before resuming employment, an employee must submit a statement from the employee's health care provider indicating that the employee is able to return to work either with or without restrictions. The Town reserves the right to have the employee examined by a physician selected and paid for by the Town to determine the employee's fitness to return to work either with or without restrictions. Failure to return to work when required may be considered a voluntary termination of employment.

- **Early Return** – An employee who intends to return to work earlier than anticipated must notify the Department Head or Town Supervisor at least five business days prior to the date the employee is able to return. The Department Head shall in turn notify the Town Supervisor.

- **Extension of Unpaid Leave of Absence** – An employee who wants an extension of the leave previously requested must notify the employee's Department Head or Town Supervisor at least two business days

from the date the change occurred which necessitates the change in leave time. The Town Supervisor reserves the right to approve all leave extensions.

NEW YORK PAID FAMILY LEAVE LAW

Legislation passed in NY in 2016 and labelled Paid Family Leave Law will provide a phased-in system of paid family leave benefits providing covered employees up to 12 weeks of paid family leave. **Please note that the Town is not required to provide this benefit but can do so if it chooses.** The Town of Big Flats has determined that as of January 1, 2017 it will provide this benefit. At any time thereafter the Town Board may pass a resolution opting out of this benefit unless the union may negotiate the provision of this benefit to its members. **This will be phased in over a four year period commencing on January 1, 2018.** Once fully phased in, covered employees will be eligible for up to 12 weeks of paid family leave annually to care for an infant or a family member with a serious health condition, to bond with an employee's new child by birth, adoption or foster care, or to assist with family obligations when a family member is called into active military service. **Eligible employees will be paid by a state fund – not their employers – financed by deductions taken directly from employees' wages, not from tax contributions paid by employers.**

The paid family leave is not available for an employee's own serious health condition, although an employee may be eligible for income protection benefits under New York's existing short-term disability insurance program or workers compensation if applicable and the Federal Family Medical Leave law.

The Legislation finances paid family leave benefits in a manner similar to the method used to finance Workers compensation and state disability benefits – through a deduction directly from the employee's pay. The amount of this deduction has not yet been issued, and the maximum deduction will be determined by the State on June 1, 2017 and thereafter annually on September 1 of each succeeding year. Its size will be determined by the total cost of providing the cost of this paid medical leave and number of employees covered.

Leave Entitlement

Paid family leave benefits will be available for employees in New York who have worked 26 (less than required for FMLA protection) or more consecutive weeks for their employer and will be for a 12 week period as in the FMLA. Eligible employees meeting these criteria may receive paid family leave (1) to provide care for a family member because of the family member's serious health condition; (2) to bond with their child during the first 12 months after the child's birth, or during the first 12 months after placement of the child for adoption or foster care; or (3) to attend to obligations arising because the spouse, child, or parent of the employee is on active duty or has been notified of an impending call to active duty in the United States armed forces. Upon return to work within that period the employee will be reinstated in their former position or a comparable.

Intermittent Paid Leave Benefits Permissible

Paid Family Leave benefits under PFLBL may be payable to employees for paid family leave taken intermittently or for less than a full work week in increments of one full day or one-fifth of the weekly

benefit. The statute does not address whether family leave itself must also be taken in at least full-day increments, whether intermittent leave may be taken in the same manner as under the FMLA,¹⁶ or pursuant to some other schedule. Regulations to be promulgated by the Director of Workers Compensation may clarify the operation of intermittent leave under PFLBL.

An employee must use eligibility for Family Medical Leave Act leave time concurrently with this paid family leave time.

Contrary to the Family Medical leave act wherein an employer can mandate an employee use accumulated vacation or sick leave time first, this law states that the Town may offer an employee the choice of using accrued paid leave or the Paid Family Leave and receive the benefit due under the Paid Leave law.

Employment Benefits Must Be Maintained During Leaves of Absence

This new statute holds that “in accordance with the Family and Medical Leave Act,” employees taking family leave under PFLBL may lose no employment benefits because they take family leave. Employers must maintain an employee’s existing health insurance benefits for the duration of the employee’s family leave, as if they had not taken such leave. However, employees taking paid family leave are not entitled to accrue seniority or other benefits such as vacation time, sick time etc. during their leave as if they had never taken leave.

The language of PFLBL indicates that the FMLA’s provisions requiring employers to continue making contributions to maintain group health plan benefits during an employee’s family leave apply to leaves covered by PFLBL. Until regulations are issued, it is not clear whether employers will be able to recover premiums from employees who choose not to return to work, as is permitted under the FMLA.¹⁹

Retaliation Prohibited

The statute prohibits retaliation against any employee for seeking or receiving paid leave or paid leave benefits provided by the PFLBL, similar to the existing prohibition in the Worker’s Compensation Law against retaliation because an employee seeks or receives Workers compensation benefits.

Coordination of Paid Family Leave with Paid Time Off and Other Leaves

The PFLBL provides employers some protection and flexibility when applying for leave benefits available under PFLBL to the employer’s own internal paid time off policies and leave entitlements under the federal FMLA. The statute specifically requires that:

- 1) No employee may receive family leave benefits over 12 weeks during any 52-week period, or in any period where family leave combined with disability benefits exceeds 26 weeks during the same 52 calendar weeks.
- 2) Prior to receiving paid family leave benefits, an employee must provide a notice to the employer and a medical certification in a form to be generated by the Chairman of the Workers Compensation Board. Employees may not receive family leave benefits for any period where such certification has not been filed.
- 3) An employer may require an employee eligible for paid family leave benefits and who has accrued unused “vacation or personal leave” available at the time of family leave to choose whether to charge

their paid time off and receive their full salary, or to not charge their paid time off accrual and instead receive paid family leave benefits. As written, and in the absence of clarifying regulations, PFLBL does not on its face permit employers to compel employees to use their available paid leave time towards the PFLBL benefit, as is permitted under the FMLA. However, an employer that pays full salary during a period of paid family leave may request reimbursement by their insurance carrier for advance payment of benefits. With either option, however, the employee will be entitled to reinstatement to the same or a similar position.

4) Employees must use FMLA leave and state Paid Family Leave concurrently. Employees may not stack leave time to take over 12 weeks, or the maximum duration of leave permitted at the time by the phase-in schedule.

5) Employees may not concurrently receive New York State disability benefits and paid family leave benefits.

6) When the necessity for family leave is foreseeable, employees must provide the employer with not less than 30 days' advance notice. If the leave is foreseeable but will begin in fewer than 30 days, the employee must provide as much notice as is practicable.

Employees Not Eligible to Receive Benefits

The legislation also identifies several circumstances when paid family leave benefits are not payable. These include:

- Any time an employee is receiving total disability benefits under a claim for Workers compensation, volunteer firefighters or volunteer ambulance Workers benefits. However, if an employee is receiving partial disability payments, the amount of family leave benefits combined with the benefits under those laws may not exceed the employee's average weekly wage.
 - To an employee not employed or who is on administrative leave from his or her employment.
 - To an employee currently receiving sick pay or paid time off from the employer; and
 - For any day in which the claimant works at least part of the day during the same working hours as those for which family leave benefits are claimed.
- *For any period where the required notice and medical certification have not been filed.
- *For any disability caused by the willful intent of the employee to bring about an illness or sickness of himself or another and for any injury or sickness sustained by the employee in the perpetration of an illegal act by the employee.

These restrictions are designed to prevent duplicative payment of benefits, and do not, on their face, restrict the employee's ability to take time off without receiving paid leave benefits. Future regulations may clarify such scenarios.

Interaction with Federal Family and Medical Leave Act: Key Similarities and Differences

Similarities Between PFLBL and FMLA The PFLBL attempts, in several instances, to incorporate the FMLA. The similarities are significant, and include:

- 1) Both FMLA and PFLBL provide a leave of absence of up to 12 weeks for family obligations for covered employees arising from the serious health condition of a family member, or for the birth, placement or adoption of a child, or because of family obligations arising because a family member is called into active duty in the United States Armed forces;
- 2) Both statutes require that employees taking leave be restored to the same position or a similar position as that they held prior to leave;
- 3) Both statutes require employers to maintain an employee's health insurance benefits during the period of leave, but do not require the accrual of seniority or other benefits during their leave as if they had not taken leave;
- 4) Both statutes require completion of a notice to the employer and a medical certification form prior to commencing leave.
- 5) Both statutes require 30 days' notice of foreseeable leave, or as much notice as is practicable;
- 6) Both statutes prohibit retaliation against an employee for requesting or for receiving leave benefits; and
- 7) Leave benefits under the FMLA must be used concurrently with paid leave benefits under PFLBL, unless the employer permits otherwise.

Differences Between PFLBL and FMLA

Despite the similarities between the two statutes, there are crucial differences between PFLBL and FMLA that employers and employees should be aware of. These include:

- 1) Many more employees are covered by PFLBL than by FMLA, for two reasons. First, PFLBL applies to any employees of employers covered by the New York State Workers Compensation Law, regardless of the size of the employer as well as all governmental employees. In contrast, FMLA covers only employees working for employers with 50 or more employees in a 75-mile radius as well as all governmental employees. Second, employees are covered by PFLBL after 26 weeks, or six months, of employment commencing on the 175th day of employment with the employer. Under the FMLA, employees must be employed for 12 months and for at least 1,250 hours in the 12-month period preceding the leave.
- 2) The PFLBL provides paid leave benefits to eligible employees by amending the New York Workers Compensation Law. Paid leave benefits under PFLBL will be financed by deductions from employee pay and will cover the gap between Workers compensation benefits, state disability benefits, and private disability insurance. However, PFLBL provides neither paid benefits nor a leave of absence for the employee's own serious health condition. The FMLA, in contrast, does not provide any paid benefits, but does provide an unpaid leave of absence to covered employees for their own serious health condition, as well as for all the family leave categories covered by PFLBL.

3) As written, PFLBL allows an employer to require an employee to choose between using accrued but unused paid time off under the employers' policies and paid family leave. Under FMLA, but not PFLBL, an employer may compel an employee to substitute paid time off for unpaid family and medical leave.

4) The FMLA provides several additional provisions regarding service member leave beyond exigent circumstances arising because a family member is called into active military service, such as leave to care for a family member who is a member of the United States Armed Services, elaborating required notice of military leave, or addressing circumstances when two spouses employed by the same employer are called into active military service. While PFLBL covers family leave arising from a family member being called into active duty, it does not yet address these additional scenarios.

The substantive provisions of the NY Paid Family Leave Law do not take effect until January 1, 2018. The Chair of the Workers Compensation Board is tasked with issuing interpretive regulations, which should provide some much-needed clarification prior to the benefits' requirements taking effects.

Otherwise the bulk of the FMLA regulations apply to NY Paid Family Leave.

Schedule for Implementation of Paid Family Benefits

The requirement to provide paid leave, the amount of leave required, and the amount of pay that employees may receive will be phased in as follows:

(i) On or after January 1, 2018, employees may receive up to eight (8) weeks of paid benefits in any 52-week period at 50% of their average weekly wage, but in an amount not to exceed 50% of the New York State average weekly wage ("NYSAWW").

(ii) On or after January 1, 2019, employees may receive up to 10 weeks of paid benefits in any 52-week period at 55% of the employee's average weekly wage, but not to exceed 55% of the NYSAWW.

(iii) On or after January 1, 2020, employees may receive up to 10 weeks of paid benefits in any 52-week period at 60% of the employee's average weekly wage not to exceed 60% of the NYSAWW.

(iv) On or after January 1, 2021, and for each year thereafter, employees may receive up to 12 weeks in any 52-week period at 67% of the NYSAWW.

HOWEVER, the paid leave legislation anticipates that an economic downturn may affect the economic feasibility of implementing the law, and allows the Superintendent of Financial Services to delay the scheduled increases in the paid leave benefits based upon several factors, including the current cost to employees of the paid leave benefits (because the benefits are financed by deductions from their pay), the availability of insurance policies providing paid leave benefits, and the impact of the benefit increase on employers' businesses.

In order to get this benefit the employee must file a claim for family leave benefits and the first payment of benefits is due on the fourteenth day of family leave unless the claim is rejected by the employer or carrier and they must notify the employee of a rejection with eighteen days of the filing of a claim. If accepted payments then are due every two weeks or monthly if the employee was paid monthly.

